

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**JOSE MARIO VILLEGAS,  
aka MARIO PIEDRA SALAZAR, *Applicant***

**vs.**

**M&M FRAMING-J.D. MILLER CONSTRUCTION, INC.;  
ZURICH NORTH AMERICA, *Defendants***

**Adjudication Number: ADJ13388235  
Marina del Rey District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will grant reconsideration, amend the September 8, 2023 Second Amended Findings and Award to defer the issues of permanent disability, attorney fees, and commutation. We will otherwise affirm the WCJ's decision, except that we correct the Award to reflect that it is made against the insurer and not the employer.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

We observe, moreover, it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the September 8, 2023 Second Amended Findings and Award is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the September 8, 2023 Second Amended Findings and Award is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

**FINDINGS OF FACT**

\* \* \*

4. The issue of permanent disability is deferred

\* \* \*

6. The issue of attorney fees is deferred.

**AWARD**

**AWARD IS MADE** in favor of **JOSE MARIO VILLEGAS AKA MARIO PIEDRA SALAZAR** and against **ZURICH NORTH AMERICA** as follows:

a. Temporary disability indemnity at the rate of \$605.07 per week beginning July 30, 2020, and including November 21, 2021, less attorney fees.

b. The issue of permanent disability is deferred.

c. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

**ORDER**

**IT IS FURTHER ORDERED** that the issue of commutation is deferred.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**ANNE SCHMITZ, DEPUTY COMMISSIONER**  
**CONCURRING NOT SIGNING**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**December 1, 2023**

**SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

**JOSE MARIO VILLEGAS (aka MARIO PIEDRA SALAZAR)  
HINDEN & BRESLAVSKY  
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK**

**PAG/abs**

I certify that I affixed the official seal of the  
Workers' Compensation Appeals Board to this  
original decision on this date. *abs*

**REPORT AND RECOMMENDATION ON  
PETITION FOR RECONSIDERATION**

**I**

**INTRODUCTION**

- |                            |  |
|----------------------------|--|
| 1. Applicant's Occupation: | Laborer/Construction   |
| 2. Date of Injury:         | 5/19/2017 - 5/15/2020  |
| 3. Identity of Petitioner: | M & M Framing J. D. Miller Construction;<br>Zurich North America, Inc. |
| 4. Timely:                 | Yes  |
| 5. Verification:           | Filed  |
| 6. Date of Order:          | September 7, 2023  |

**Petitioner's Contentions are as follows:**

- A. This WCJ erred by not relying on the medical report by PQME Dr. Patrick O'Meara, M. D., med-legal evaluator, determined that applicant did not suffer injury AOE/COE and that applicant has zero impairment.
- B. This WCJ erred in finding the medical reporting by Dr. Arlen Green was substantial medical evidence when Dr. Green's medical reporting is not admissible substantial medical evidence in support of a finding of industrial injury. •
- C. This WCJ erred by relying on medical reporting of Dr. Green when Dr. Green's reporting is not admissible substantial medical evidence in support of a finding of industrial injury as the reporting fails to properly apply the AMA Guides to impairment.
- D. This WCJ erred by relying on the medical report of Dr. Green when Dr. Green's reporting is not admissible substantial medical evidence in support of a finding of industrial injury as it is not based on inaccurate medical history.
- E. This WCJ erred in finding Dr. Green's permanent and stationary report when Dr. Green's reporting is deficient giving an incomplete medical examination.

F. This WCJ erred in relying upon Dr. Green's November 22, 2021, medical report on grounds it should be excluded and found inadmissible.

Applicant's Petition for Reconsideration should be granted.

## II.

### SUMMARY OF FACTS

Applicant alleged that he sustained a cumulative trauma injury from May 9, 2017 through May 15, 2020 to his neck, cervical spine, thoracic spine, lumbar spine, bilateral legs, and bilateral knees while working as a laborer/construction for M&M Framing d.b.a. J.D. Miller Construction, as administered by Zurich North America. On July 10, 2020, Applicant filed an Application for Adjudication of Claim. Defendants denied the claim.

The matter went to trial and on August 11, 2023, this WCJ issued a Findings of Fact and Order and Opinion on Decision finding no AOE/COE. On August 25, 2023, Applicant filed a Petition for Reconsideration. Subsequent thereto, on September 6, 2023, this WCJ issued a First Amended Finding and Award that the Applicant sustained injury to his neck, cervical spine, thoracic spine, lumbar spine, knees, and legs. Applicant was awarded permanent disability of 31% entitling Applicant to 138 weeks of disability indemnity payable at the rate of \$290 per week in the total amount of \$40,020, that Applicant may require further medical treatment to cure or relieve from the effects of this injury, and the reasonable value of the services and distributions of Applicant's Attorney in the amount of \$5982.17 for permanent disability award and 15% for temporary disability award.

On September 8, 2023, this WCJ issued a 2<sup>nd</sup> Amended Finding and Award amending because of clerical error. On October 2, 2023, Defendant filed a Petition for Reconsideration. Applicant's Attorney filed an answer to Defendant's Petition for Reconsideration.

## III.

### DISCUSSION

A. This WCJ erred by not relying on the medical report by PQME Dr. Patrick O'Meara, M. D., med-legal evaluator, determined that applicant did not suffer injury AOE/COE and that applicant has 0% impairment.

Applicant credibly testified he would load materials like plywood and beams. The applicant testified to loading planks of plywood by himself. The planks weighed between 20 and 30 pounds. Applicant would load beams weighing 500 pounds with help. Applicant would also load beams weighing 102 through 150 pounds by himself. Applicant would stand for 5 of the 8 hours, with repetitive bending, lifting, and gripping. (Minutes of Hearing and Summary of Evidence dated 1/25/2023 at 2:15- 20).

His testimony was uncontroverted. The applicant injured his knee, back, leg, and neck while carrying heavy materials at work.

When Dr. O'Meara examined applicant on May 12, 2021 (Exhibit. A), he had no prior medical reports for Applicant. Applicant credibly testified that the doctor spent 5 minutes with him and did not examine the applicant with his hands, notwithstanding the medical records of Dr. O Meara dated May 12, 2021, and May 13, 2022 (Minutes of Hearing and Summary of Evidence dated 1/25/2023 at 3:13-17).

On July 14, 2020, Applicant sought treatment at the emergency department of Garden Grove Hospital Medical Center. There he was treated by Kevin K. Truong M.D. who noted that applicant had a **history of chronic upper back pain due to his manual labor.**

(Exhibit F). (Emphasis added).

Dr. O'Meara did not review diagnostic testing or review MRIs. Dr. Green's medical reports are substantial medical evidence, Dr. O' Meara's reports are not.

B. This WCJ erred in finding the medical reporting by Dr. Arlen Green was substantial medical evidence when Dr. Green's medical reporting is not admissible substantial medical evidence in support of a finding of industrial injury. This WCJ erred in relying upon Dr. Green's November 22, 2021 medical report on grounds it should be excluded and found inadmissible. (F)<sup>1</sup>

Labor Code Section 5502 (d) (3) states the following:

"Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall be inadmissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference."

The correspondence letter from applicant's attorney to PTP Dr. Green demonstrates that applicant exercised due diligence to obtain the medical reports. The correspondence stated the following:

"Please send us a medical legal report stating that you have read reviewed the enclosed materials, including the materials listed on the enclosed document review sheet.

**As a hearing has been set for 9/15/2021**, please provide us with your medical legal report as soon as possible." (Exhibit G Correspondence to Dr. Arlene Green, with Panel Qualified Medical Evaluation Report and subpoenaed records from

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<sup>1</sup> This WCJ is handling Petitioner's Contentions "B" and "F" together.

Garden Grove Hospital Medical Center, from Applicant's Attorney dated 8/27/2021). (No emphasis added).

Subsequent thereto, Dr. Green issued supplemental report dated October 8, 2021) Exhibit 4) and Permanent and Stationary report dated November 22, 2021. (Exhibit 5) Again, Applicant tried to obtain timely medical reports from Dr. Green but was unable to do so. Applicant treated with Dr. Green from July 30, 2020, through September 21, 2021, 19 visits. (Exhibits 2 and 3).

Decisions of the Appeal Board must be supported by substantial evidence. (Labor Code Section 5903, 5952). **Lamb v. Workers' Compensation Appeals Board (1974) 39 CCC 310; Garza v. Workers' Compensation Appeal Board (1970) 35 CCC 500; LeVesque v. Workers' Compensation Appeals Board (1970) 35 CCC 16.** "For the opinion on decision to be meaningful, the *WCJ must refer with specificity to an accurate and completely developed record.*" **(Hamilton v. Lockheed Corporation (Hamilton) (2001) 66 CCC 473, 475 (Appeals Board en banc)).** **(Emphasis added.)**

The medical reports of the treating physician can be submitted into evidence after the MSC according to Labor Code Sections 5502(d) (3) and Labor code section 5703.

Labor Code Section 4060(b) states the following:

"Neither the employer nor the employee shall be liable for any comprehensive medical-legal evaluation performed by other than the treating physician, except as provided in this section. However reports of treating physicians shall be admissible.

The Permanent and Stationary Report by PTP Arlene Green MD dated 11/22/2021 is evidence not in existence prior to the Mandatory Settlement Conference even though Applicant exercised due diligence. (Labor Code Sections 5502 (d)(3) and 5703). The Permanent and Stationary Report by PTP Arlene Green MD dated 11/22/2021 is admitted into evidence as Applicant's Exhibit 5.

**C. This WCJ erred by relying on medical reporting of Dr. Green when Dr. Green's reporting is not admissible substantial medical evidence in support of a finding of industrial injury as the reporting fails to properly apply the AM Guides to impairment.**

The assertion by the Defendants that the medical report of Dr. Green fails to properly apply AMA Guides to impairment is correct.

Applicant credibly testified he saw QME Dr. Patrick O'Meara on May 12, 2021. The doctor spent 5 minutes with him. The doctor did not examine applicant with his hands. The doctor took no tests. The doctor asked him questions such as where he was hurting and on a scale of 1 to 10, what was his level of pain. The doctor also asked him the name of his personal physician. (Minutes of Hearing/Summary of Evidence dated January 12, 2023 at 3:13-16).

Dr. O'Meara was not served or did not review Dr. Green's PR's from August 27, 2020 through September 21, 2021 which show that applicant claimed of pain in his neck, cervical spine, thoracic spine, lumbar spine, knees and legs. Dr. O'Meara did not review the MRI dated 8/22/20.

Dr. O'Meara did not take a thorough statement of Applicant's job. In his Clinical Resume of Mr. Villegas-Costello<sup>2</sup> it states the following:

"While working for M & M Framing, he worked 8 hours per day, 5 days per week. He was doing framing of residential buildings. He states his job required heavy lifting and carrying forklifts during his work duties. He worked for this employer for 3 years.

Applicant credibly testified he would load materials like plywood and beams. The applicant testified to loading planks of plywood by himself. The planks weighed between 20 and 30 pounds. Applicant would load beams weighing 500 pounds with help. Applicant would also load beams weighing 102 through 150 pounds by himself. Applicant would stand for 5 of the 8 hours, with repetitive bending, lifting, and gripping. (Minutes of Hearing and Summary of Evidence dated 1/25/2023 at 2:15- 20). His testimony was uncontroverted. The applicant injured his knee, back, leg, and neck while carrying heavy materials at work. Dr. Green was the first doctor that told him that his job was responsible for his injuries. (Minutes of Hearing/Summary of Evidence dated January 25, 2023).

This WCJ finds QME Dr. Patrick O'Meara spent 5 minutes with the Applicant and his medical report dated 5/12/2021 cannot be relied upon or considered substantial medical evidence. This WCJ further finds that PTP Dr. Arlene Green MD's permanent and stationary report dated 11/22/2021 is not substantial medical evidence for the failure of the report to properly apply AMA Guides.

D. This WCJ erred by relying on the medical report of Dr. Green when Dr. Green's reporting is not admissible substantial medical evidence in support of a finding of industrial injury as it is not based on inaccurate medical history.

Defendant asserts that the medical report by Dr. Green does not take an adequate medical history from the Applicant and does not provide a review of the medical records section. Defendants argue that on page 2 of November 22, 2021 report under Prior or Subsequent Injuries, Dr. Green states that Applicant denied having sustained any prior or subsequent work related injuries or any new injury to the subject body parts. He did not indicate any past personal injuries. (Applicant's Exhibit 5p). However, as per the July 14, 2020 emergency room evaluation at Southland Integrated Services, Applicant had been evaluated for neck pain due to carrying a 5 gallon water container at home and feeling a pop approximately a month after having stopped working for M& M Framing .(Defendants' Exhibit D).

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<sup>2</sup> Dr. O'Meara used the wrong name for Applicant. Dr. O'Meara referred to Applicant as Mr. Villegas-Costello when discussing Current Complaints: activities of daily living.



According to the record applicant finished elementary school. When asked questions about his employment history after leaving M&M Framing and was also asked about his demolition work, Applicant explained:

He was confused about the questions asked at his deposition. He testified that he remembers going to Southland emergency room for treatment but does not remember the date. He does not remember his neck complaints. He does not remember lifting a 5-gallon water container and feeling a pop in his neck. It is incorrect because he tried to lift it but was unable to lift the 5-gallon container. Because he did not lift the 5-gallon container, he did not hear a pop in his neck. The incident happened while he was at home. This WCJ assumes that Dr. O'Meara read Applicant's deposition prior to the examination.

During cross-examination, Defendants directed the applicant's attention to the applicant's deposition at page 53, lines 24, through page 54, line 9, he testified "he does not remember Southland, and he does not remember Dr. Nguyen. He does not remember the name of his personal doctor. He never had a specific injury to his neck. He never told Dr. Green that he treated at Southland for his neck. He first experienced neck pain when **he stopped taking pills 6 months before leaving work**". (Emphasis Added). Minutes of Hearing/Summary of Evidence dated June 12, 2023.

Defendant ended Applicant's cross-examination with the aforementioned questions. Of particular interest to this WCJ is the failure of defendant to ask the following questions: what pills he was taking, why he was taking the pills and how long he was taking them.

This WCJ finds that the medical report of Dr. Green's reporting is admissible substantial medical evidence in support of a finding of industrial injury as it is not based on inaccurate medical history.

E. This WCJ erred in finding Dr. Green's permanent and stationary report when Dr. Green's reporting is deficient giving an incomplete medical examination.

The difference between Dr. Green's medical examination and Dr. Meara's medical examination is that Dr. Green felt spasms and Dr. Meara did not. Which questions whether Dr. O'Meara conducted a medical evaluation which required him to touch Applicant.

In the opinion of this WCJ, both doctors must file supplemental reports correcting their errors for substantial medical evidence reporting.

**IV.**

**RECOMMENDATION**

It is recommended that the Petition for Reconsideration is granted.

Date: 10/23/23

**Yvonne R. Jones**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE